



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: OUKO (P), OKWENGU & SICHALE, JJA]

CIVIL APPLICATION NO. 173 OF 2019

KENYA PIPELINE COMPANY LIMITEDAPPLICANT

AND

FRANCIS MWENDWA TITUSRESPONDENT

An application for conservatory orders and stay of execution of the decision of the Employment and Labour Relations Court in Nairobi (Wasilwa J.) delivered on 28th February, 2019)

IN

Petition No. 139 of 2016)

RULING OF THE COURT

The applicant, Kenya Pipeline Company Limited (KPC) filed a notice of motion application dated **12th June, 2019** seeking the following orders:

“(i) that this Honourable Court be pleased to grant an order of stay of execution of the judgment of the Hon. Lady Justice Hellen Wasilwa delivered on 28th February, 2019, in Nairobi ELRC petition No. 139 of 2016 pending the lodgment, hearing and determination of the intended appeal by the applicant herein.

(ii) that the costs of and incidental to this application be costs in the intended appeal”

In the motion, **Francis Mwendwa Titus** was named as the respondent. The applicant’s motion was supported by an affidavit dated **12th June, 2019** sworn by **Jane Joram**, the applicant’s Corporation Secretary. In the deposition (which contained submissions rather than averments), she stated that following a petition filed by the respondent in the ELR Court, **Wasilwa, J** in a judgment dated **28th February, 2019**, reinstated the respondent “... ***with backpay of all salary and allowances since the unfair dismissal***”; that on **7th March, 2019**, the applicant filed a Notice of Appeal as it was aggrieved by the said outcome; that unless an order of stay is granted, the appeal will be rendered nugatory and finally, that the respondent’s position has since been filled.

In a replying affidavit sworn on **26th July, 2019**, the respondent deponed that the motion is drawn by **Robson & Harris** Advocates who are strangers as the applicant is represented by the firm of **Ngatia & Associates**; that the intended appeal is a sham; that the applicant is not a man of straw and is able to make a refund should the intended appeal succeed, and finally, that since he had already been reinstated, the motion is overtaken by events.

On **26th August, 2019**, the motion came before us for plenary hearing. **Ms. Michira**, learned counsel for the applicant contended that the intended appeal is arguable on the basis that an order of reinstatement is a specific performance order. On the nugatory aspect, counsel contended that the respondent had already been replaced and an order of reinstatement, unless stayed, will lead to double payment of salary.

In opposing the application, **Mr. Okoth**, learned counsel for the respondent urged us to consider the particular circumstances of this case; that no recruitment had been carried out as alleged by the applicant and that the firm on record is that of **Ngatia & Associates** who filed the Notice of Appeal on **7th March, 2019** and the firm of **Robson Harris** is yet to file a Notice of Change of Advocates.

In a brief response, **Ms. Michira** pointed out that an application to come on record in place of **Ngatia & Associates** had been filed by her firm, namely, **Robson Harris**.

We have considered the record, the rival oral arguments made before us, the authorities cited and the law. The twin principles to be considered in an application for stay are that an applicant has to show that he/she has an arguable appeal which will be rendered nugatory, absent stay. As always, our jurisdiction under **Rule 5(2)(b)** is discretionary and fairly wide, guided only by the interests of justice. In the judicious exercise of this discretion, however, the Court must be satisfied on the twin principles, firstly, that the intended appeal is not frivolous or is arguable; and secondly, that if the orders sought are not granted, the success of the intended appeal will be rendered nugatory. These principles were aptly summarized in the case of **Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 Others [2013] eKLR** as follows :

"i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See Ruben & 9 others v Nderitu & Another (1989) KLR 459.

ii) The discretion of this court under Rule 5(2) (b) to grant a stay or injunction is wide and unfettered provided it is just to do so.

iii) The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. Halai & Another v Thornton & Turpin (1963) Ltd. (1990) KLR 365.

iv) In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. David Morton Silverstein v Atsango Chesoni, Civil Application No. Nai 189 of 2001.

v) An applicant must satisfy the court on both of the twin principles.

vi) On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.

vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.

viii) In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.

ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232.

x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim”.

International Laboratory for Research on Animal Diseases v. Kinyua, [1990] KLR 403.

It is not in dispute that the respondent was the applicant's employee with effect from **1st July, 2003**. His job description was Internal Auditor. However, according to the respondent, he was suspended on **9th May, 2016**, on allegations of leaking information regarding tenders to external parties; that on **11th July, 2016**, he received a show cause letter giving him 48 hours to respond to allegations thereto; that on **4th August 2016**, he was invited to attend a hearing which was to take place on **9th August 2016**; that he duly attended the hearing which was but a charade that led to his termination vide a letter dated **14th November, 2014**.

On the other hand, the applicant contended that it followed due process in laying off the respondent.

We have considered the rival position of the parties herein, the authorities relevant to the motion and the law. On **14th November, 2016**, following alleged infraction on the part of the applicant, the respondent filed a petition before the ELRC which petition was amended on **6th March, 2017**. The applicant resisted the petition vide a replying affidavit sworn on **8th May, 2017** by **Joe Sang**, the then Managing Director of the applicant.

In her judgment of **28th February, 2019**, the judge found as follows:

“I have considered the evidence and submissions. I find for the Petitioner and order that he be reinstated accordingly with backpay of all salary and allowances since the unfair dismissal. In default, the petitioner should be re-engaged on same terms without loss of pay or promotions. The respondent will pay costs of this suit”.

The applicant intends to challenge on appeal whether it was lawful for the ELRC to order reinstatement of the respondent. This in our view is not an idle position. It is arguable whether an order of reinstatement is a lawful order in the circumstances of the case. We are therefore satisfied that the applicant has satisfied the first limb of arguability.

However, an applicant must also be able to demonstrate that the appeal will be rendered nugatory, absent stay. In urging this limb of the motion, the applicant's counsel maintained that paying two employees is not a prudent utilization of the applicant's resources. Regrettably, this is not a consideration in an application under rule 5(2)(b). The respondent deponed that he is in a position to refund any sum of money paid to him by way of salary and he undertook to refund moneys paid to him should the appeal succeed. Further it was the respondent's position that the application is overtaken by events as he has already been reinstated. The reinstatement was not denied by the applicant.

Considering the above, we are of the humble view that the respondent having been reinstated, there can be no stay.

On representation of the applicant by **Robson Harris**, though no notice of change is on record in terms of Rule 23 (1) of the Court of Appeal Rules, no prejudice has been occasioned and such notice of change

can be filed at any time.

The upshot of the above is that we find no merit in the motion. It is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY, 2020.

W. OUKO (P)

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR